persons might test the law is apparent. No authority was given to prosecute the crime when committed against a non-resident, and a criminal statute cannot by construction be made to embrace cases plainly without the letter, though within the reason and policy of the law.[18] There could be no prosecution under the common law, that having been repealed by the codification of the whole subject of criminal law.[19] Nor could a prosecuting officer, in behalf of the people, set up the unconstitutionality of the act.[20] While, in the present instance, a word to the legislature would undoubtedly have resulted in the correction of the erroneously drawn statute, a case is conceivable where the protection of the criminal laws might purposely be withheld from a particular class or race, under which circumstances such a course would be ineffectual. On the whole, while it is true that the defendant in the principal case could not, if the general rule were strictly applied, question the constitutionality of the law, a rule, which, it has been shown, is founded upon the desire of the courts to avoid officious meddling with legislative enactments, nevertheless, this element being entirely absent in the principal case, the action of the court, in view of the exceptional facts, and on grounds of necessity, would seem entirely justifiable.

STREET CLOSING AND PRIVATE EASEMENTS IN NEW YORK.—The closing of streets in furtherance of improved street plans, authorized by statute, involves two distinct classes of rights: those of the public, which the abandonment of the street *ipso facto* terminates, and those of the abutting owners, comprising private easements of access, light and air, which can be extinguished only by the parties, or by the state, in the exercise of its power of eminent domain. Under statutes providing merely in general terms for the vacation of streets, it has been held that these private easements are unaffected by the vacation of the street.[1] The existing New York statute, however, provides for the extinguishment of private easements upon payment of compensation.[2] In *Matter of the Mayor*,[3] the Appellate Division of the Supreme Court of New York (affirmed by the Court of Appeals without opinion)[4] has declared this a valid exercise of the power of eminent domain, on the ground that the primary purpose of the act in question is the public benefit from an improved street plan with the alleged advantages of travel, sewerage and drainage, and that the incidental private use by one individual of property taken from another is immaterial.

Although it is universally agreed that private property can be taken by the state for public use only, the term "public use" has eluded exact definition. Two views are, however, well marked: (1) Actual use by the public. Under this view it would seem that the property taken, or the servient tenement, where an easement is extinguished, must be subjected to the

[18]State *v.* Lovell (1867) 23 Ia. 304.

[19]Com. *v.* Cooley (Mass. 1830) 10 Pick. 37, 39; Com. *v.* Dennis (1870) 105 Mass. 162.

[20]People *v.* Rensselaer, etc. R. R. Co. (N. Y. 1836) 15 Wend. 113.

[1]Hollowell *v.* Southmayd (1893) 139 N. Y. 390.

[2]Chap. 1006, Laws of 1895.

[3](1898) 28 App. Div. 143.

[4](1898) 157 N. Y. 409.

use.[5] The statute in question, however, merely gives a private owner the unencumbered fee. (2) A use from which an advantage enures to the public.[6] Although the justification of the statute may at first sight in some cases seem fanciful, to a greater or less degree, according to the circumstances, it would seem in reality to exist within the limits of this view which concededly gives a wide discretion to the legislature.[6] The New York courts, however, have always adhered to the former rule.[7] Unless they are prepared to shift their ground, it may be necessary to reconsider the validity of this legislation, somewhat summarily passed upon.

In a recent New York case, *Swain* v. *Schonleben* (App. Div. 1909) N. Y. Law Jour. Vol. XL, No. 143, the court adhered to this extension of the old rule. It was further decided that A who owned a lot abutting on a closed street, together with the fee of the adjoining half of the highway, would not by a conveyance of the lot in which the vacated highway was described as a boundary re-create these easements of access, air and light.

Ordinarily a grant of land described as bounded by a way existing[8] or prospective[9] will give the grantee an easement of access, for the grantor is estopped to deny the existence of the way.[10] This doctrine is inapplicable, however, when the way is over the land of a stranger.[11] Implied easements are based upon the probable intention of the parties, to be gathered from the deed, the situation of the premises, and the circumstances surrounding the transaction.[12] The grant of land abutting on property dedicated as a public highway,[13] or presumably intended to be so dedicated,[14] carries with it easements of light and air which by usage have become inseparable incidents of public highways. Such easements do not seem to be implied, however, in connection with private ways.[15] These principles are controlling in the present case. The ownership of the grantor being confined to single sections of a vacated street, the circumstances warranted no implication of easements of access, light and air. On the assumption, however, that these private easements survive the closing of the street, it would seem that a subsequent conveyance of this kind would include the easements incident to the land in the hands of the grantor, as appurtenant thereto. And easements over the adjoining strip of the highway retained by the grantor, would be created by necessary implication.

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[5]Lewis, Eminent Domain (2nd Ed.) 164.

[6]6 COLUMBIA LAW REVIEW 46; Meyer *v.* Village of Tuetopolis (1890) 131 Ill. 552.

[7]In Matter of Eureka Basin etc. Co. (1884) 96 N. Y. 42; Bloodgood *v.* Mohawk R. R. Co. 1837, 18 Wend. 1; see also In Matter of Albany Street (1834) 11 Wend. 148.

[8]Ranscht *v.* Wright (N. Y. 1896) 9 App. Div. 109; Parker *v.* Farmingham (1821) 17 Mass. 413.

[9]Livingston *v.* Mayor (1831) 8 Wend. 85; In Matter of Adams (1894) 141 N. Y. 297.

[10]Epley *v.* Wilkes (1872) 7 Exch. 298; McKenzie v. Gleason (1904) 184 Mass. 452.

[11]Howe *v.* Alger (Mass. 1862) 4 Allen 206; Fulmer *v.* Bates (1907) 118 Tenn. 731.

[12]Matter of Brooke Ave. (1899) 40 App. Div. 519; aff'd (1899) 161 N. Y. 622; King *v.* Mayor (1886) 102 N. Y. 172; Neeley *v.* Philadelphia (1905) 212 Pa. St. 551; Hopkinson *v.* McKnight (1866) 31 N. J. L. 422; Reegan *v.* Boston, etc. Co. (1884) 137 Mass. 37.

[13]Story *v.* N. Y. etc. Co. (1882) 90 N. Y. 113; Lahr *v.* Met. etc. Co. (1887) 104 N. Y. 268; Fifth Nat'l Bank *v.* N. Y. etc. Co. (1885) 24 Fed. 114; Barnett *v.* Johnson (N. J. 1856) 2 McCart. 402.

[14]Livingston *v.* Mayor (1831) 8 Wend. 85; Dill *v.* Board of Education (1890) 47 N. J. Eq. 421.

[15]See Butelle *v.* Lipson (1908) 80 Conn. 497; Gerrish *v.* Shattuck (1882) 132 Mass. 235.